No. 80-5

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

RICHARD JOHN MCCARTY, *APPELLANT*

v.

PATRICIA ANN MCCARTY, *APPELLEE*

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA FIRST APPELLATE DISTRICT

Motion of The Non-Commissioned Officers Association of The United States of America, The Retired Officers Association, The Air Force Sergeants Association, The Fleet Reserve Association, The Reserve Officers Association of The United States, The National Association for Uniformed Services and The Marine Corps League For Leave To File Brief As *Amici Curiae* and *Amici Curiae* Brief.

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SUBJECT INDEX

	Page
Table of Authorities Cited	iii
Motion to file *Amici Curiae* Brief	1
Question Presented	4
Summary of Argument	4
The Interests of the *Amici*	4
Amici Curiae Brief	4
Statement	8
Discussion	8
I Purpose of Military Retired Pay Is The National Defense	8
A To accomplish this purpose the retired pay system has three goals: to increase morale, to provide a programmed career pattern which encourages trained youth to serve, and to provide stability for members of the armed forces	9
B The goals of the retired pay system relate to the choices of the service member, not others	10
C Congressional action demonstrates an intent to confer the benefits of retired pay on the service member, not others	10
D The relationship of retired pay to national defense suggests that retired pay is an inducement to fight, and if need be, die for the national good	12
E The risk continues after retired status accrues	12
F At this time in history, military compensation is, more than ever, a part of national defense policy	13
II Local and State Property Law Frustrates the National Defense as It Affects Retired Pay	14
A Retiring military personnel must carefully consider which jurisdictions are threats to retired pay	14
B "Forum Shopping" by spouses, at government expense, is encouraged to maximize their divorce or dissolution rights	15

C The differing state laws produce confusion and undermine the military member's conception of a stable benefit ... 15
D Sovereign states cannot appropriately balance national interests with state interests—nor should they be expected to do so 16
E The states' intrusions on military benefits violate the compact between the military member and the federal government, and threaten to do so in an *ex post facto* manner 17
III The *Amici* Are Not Opposed to Equitable Enforcement of Child Support, Spousal Support and Property Division by the States 18
Conclusion 19
Certificate of Service 19

TABLE OF AUTHORITIES CITED

Cases

Cose v Cose In the United States Supreme Court on Petition for Writ of Certiorari to the Supreme Court of Alaska, No. 79—1469 14
Henn v Henn 602 P2d 10, 161 Cal. Rptr. 502 (1980) 14
Hisquierdo v Hisquierdo 439 U.S. 572 (1979) 14
Hisquierdo v Hisquierdo 439 U.S. 572 (1979) 16
Payne v Payne 82 Wash 2d 573, 512 P2d 736 (1973) 9
Ramsey v Ramsey 96 Idaho 672, 535 P2d 53 (1975) 9

Constitution

The Constitution of the United States 17

Statutes

Dual Compensation Act 11
Social Security Act, 42 U.S.C. (Supp. II) 659 11
Survivor Benefit Plan, 10 U.S.C. 1447-1455 10
5 U.S.C. Section 5532 11
10 U.S.C. Sections 1447-1455 10
42 U.S.C. (Supp. II) 659 10
42 U.S.C. (Supp. II) 662 (c) 10

Texts

Army Echoes, "Text Program begins for Recall to Active Duty", U.S. Army Finance and Accounting Center, Dept. 90, Indianapolis, Indiana, May/June 1980 13

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The Non-Commissioned Officers Association of The United States of America, The Retired Officers Association, The Air Force Sergeants Association, The Fleet Reserve Association, The Reserve Officers Association of The United States, The National Association for Uniformed Services, and The Marine Corps League respectfully move this Court for leave to file the accompanying brief in this case as *amici curiae.*

The consent of the attorney for the appellant herein has been obtained, but the attorney for the appellee herein refused to consent to the filing of a brief by the above listed associations as *amici curiae.*

The applicants have an interest in this case in that the purpose of each association is to serve the national interest and the members of the armed forces. The question in this case directly affects all members of the armed forces and the national interest in that a failure to reverse the California court will potentially alter the pay of every member of the armed forces of the United States. In its impact on the pay of the armed forces, the resolution of the question herein will affect the individual members, the national defense, and the security of the Constitution of the United States.

The brief of the appellant herein argues that the decision of the California court has deprived him of a protected interest, but he has not fully argued the impact of the question herein as it relates to the national interest. The accompanying brief attempts

to expand the arguments which relate to the question herein on the basis of the national interest and members of the armed forces generally.

The applicants believe that the decisions of the courts below should be reversed.

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AMICI CURIAE BRIEF

By leave of Court, the following brief is submitted.

QUESTION PRESENTED

Whether the United States military retired pay may be considered "property" having present value, and as such, be divided by the states as community property, or that the pay must be considered "pay", earned at the time it is received, for purposes of state domestic relations law.

SUMMARY OF ARGUMENT

Military retired pay is an important, integral, and costly part of the national defense. The supremacy doctrine requires that the legislative purpose and functional integrity of the pay system not be damaged by individual sovereign states' notions of domestic relations equity.

THE INTERESTS OF THE AMICI

The more than 972,000 memberships represented by the The Non-Commission Officers Association of The United States of America, The Retired Officers Association, The Air Force Sergeants Association, The Fleet Reserve Association, The Reserve Officers Association of the United States, The National Association for Uniformed Services and The Marine Corps League present the arguments herein because the decision of this Court affects the individual members and the defense of the

United States. It is the purpose of each association to serve the individual members and for the memberships, to strengthen the defense of the Constitution and the nation.

1. THE NON-COMMISSIONED OFFICERS ASSOCIATION OF THE USA

The Non-Commissioned Officers Association of the USA (NCOA) is a patriotic, civic and fraternal organization operating under Texas Corporate Charter. The Association was founded in 1960. NCOA currently has more than 211,000 members, each of whom has served or is serving as a non-commissioned or petty officer in a regular or reserve component of the Army, Marine Corps, Navy, Air Force, Coast Guard or National Guard of the United States. Approximately 83 percent of the membership is on active duty with the remaining portion distributed among military retirees and honorably discharged veterans.

2. THE RETIRED OFFICERS ASSOCIATION

The Retired Officers Association (TROA) is a nonprofit, membership organization incorporated under the laws of the District of Columbia with headquarters in Alexandria, Virginia. TROA was founded in 1929, and has at the present time approximately 284,000 members. Membership in TROA is open to all men and women who are, or have been, commissioned or warrant officers in the Army, Navy, Air Force, Marine Corps, Coast Guard, Public Health Service, or the National Oceanic and Atmospheric Administration,

including the reserve and other components of these services. Widows and widowers of deceased members, or of any individuals who would have been eligible for membership, also qualify as auxiliary members. Among the purposes of TROA, as stated in its Bylaws, are "to aid active and retired personnel of the various services from which our members are drawn, and their dependents and survivors, in every proper and legitimate manner" and "to present their rights and interests when service matters are under consideration."

3. THE AIR FORCE SERGEANTS' ASSOCIATION

The Air Force Sergeants' Association currently has 150,230 members composed of enlisted or former enlisted members of the Air Force, the Air Force Reserve, the Air National Guard and retired members of those components. The members belong to 198 chapters througout the world.

4. THE FLEET RESERVE ASSOCIATION

The Fleet Reserve Association consists of 147,330 members who are enlisted personnel of the Sea Services (Navy, Coast Guard and Marine Corps) in active, reserve, disabled, or retired status. Membership is also extended to officers who have performed active-duty enlisted service. The Association is chartered under the laws of Pennsylvania.

5. THE RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES

The Reserve Officers Association of the United States (ROA) was organized in 1922, and chartered by Congress in June 1950. Originally, ROA consisted solely of Army Officers, Reserve, National Guard, and Retired.

Following World War II, ROA expanded its membership to all Services and it now has a membership of approximately 127,000. This number includes 66,000 Army Officers, 40,000 Air Force Officers, 12,000 Naval Officers. The balance are Coast Guard, Marine Corps, and Public Health Officers. There are also about 3,000 members who are ROTC cadets and midshipmen. The Organization has approximately 650 chapters throughout the United States and overseas, and it is very active regarding national defense issues.

6. THE NATIONAL ASSOCIATION OF UNIFORMED SERVICES

The National Association for Uniformed Services (NAUS) currently has 26,000 members, of all ranks. NAUS was founded in 1968 as an association for active reserve and retired members and veterans of the seven uniformed services of the United States. The purpose of NAUS is to support legislation and policies which maintain and improve the defense of the United States and which make service careers attractive.

7. THE MARINE CORPS LEAGUE

The Marine Corps League is a Congressionally Chartered military and veterans organization comprised of active duty, reserve, retired, and other former members of the Marine Corps. Its charter was granted by the 75th Congress of the United States and was approved on August 4, 1937. The League currently has approximately 25,000 members who are affiliated with more than 400 community based detachments throughout the United States. Its purposes are to preserve the traditions and promote the interests of the United States Marine Corps, and to support policies which strengthen the national defense.

STATEMENT

The *amici* join in the arguments and discussion of appellant as to military retired pay not being "property" subject to division in state domestic relations court. We wish to add emphasis to the policy considerations with respect to national defense which we feel dictate the same result.

DISCUSSION

I

THE PURPOSE OF MILITARY RETIRED PAY IS THE NATIONAL DEFENSE.

The fundamental purpose of retired pay of military personnel is to provide for the national defense. It is this fundamental

purpose which requires the finding that there is a federal interest to protect in the case before the Court, that the federal interest preempts state law, and that the federal interest dictates a finding that retired pay is not a vested property right. The findings by scattered state courts,[1] that retired pay is a vested property right, based upon certain characteristics of the payment, pose significant threats to the special nature of this "entitlement" and its function in national defense.

A

To accomplish this purpose, the retired pay system has three goals: to increase morale, to provide a programmed career pattern which encourages trained youth to serve, and to provide stability for members of the armed forces.

To provide for the national defense, Congress has provided the incentive of retired pay to military personnel. It is a costly program with three direct goals. By indicating direct and substantial support of the nation, retired pay increases the morale of military personnel who choose to make the military a career. By being restricted to payment only to those who serve for twenty years, it is an inducement to continue service. It is an equally significant aspect of the system that it is designed to encourage transfer to retired status after twenty years to keep the active-duty ranks young. The retired pay system thus tends to

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[1]Some State courts have approved lump sum valuation of military retired pay which establishes a very large present value for future pay.This creates a credit which effectively strips most military members of all other assets at the close of the domestic proceedings. See, e.g. *Ramsey v Ramsey* 96 Idaho 672, 535 P2d 53 (1975); *Payne v Payne* 82 Wash 2d 573 512 P2d 736 (1973).

provide a program for service career patterns. By being relatively stable, the retired pay system affords compensation for opportunities missed and assurance that the risk of service will be followed by an adequate future.

B

The goals of the retired pay system relate to the choices of the service member, not others.

The three goals are directly related to the armed forces members. It is his or her morale that is necessary to defense. It is his or her decision to remain in the military that counts. It is his or her future that is secured.

C

Congressional action demonstrates an intent to confer the benefits of retired pay on the service member, not others.

Congressional action as to retired pay repeatedly confirms the intent that it is the military member who is the beneficiary and controls the payment. The Survivor Benefit Plan (10 U.S.C. Sec. 1447-1455) allows the retired member to designate a benefit for a spouse; it is the member's choice. If divorce occurs; *by statute,* the benefit cannot be paid to the former spouse. This legislative scheme alone suggests sufficient federal limitation of retirement benefits to the armed forces member personally to establish preemption.

The retired pay plan includes specific assignment, garnishment, levy and execution limitations as well as other

limitations intended to assure the retired member the personal benefit of the plan. In the special case of child and spousal support, specific legislative provisions provide for enforcement of payment. Social Security Act 42 U.S.C. (Supp II) 659. Again, preemption is suggested by the statutory scheme and the failure to go further in allowing access to retired pay. In fact, the Act specifically does not grant access for domestic relation orders or settlements treating retired pay as property.

> "Alimony . . . (does) not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable division of property, or other division of property between spouses or former spouses." 42 U.S.C. (Supp II) 662(c)

To the extent it has the constitutional power to do so, the Congress has attempted to protect retired pay from being defined as property and divided.

Certainly it is apparent that the Congress is aware of the significance of the difference between the terms "pay" and "property" as they influence domestic relations law. In enacting the Dual Compensation Act, 5 U.S.C. Sec. 5532, the military retired pay is without exception, referred to as "pay".

D

The relationship of retired pay to national defense suggests that retired pay is an inducement to fight, and if need be, die for the national good.

The relationship of retired pay to national defense suggests that the compact made is between the United States and the potential combatant, and no one else. This relationship is intentional and has a purpose.

The military, like firefighting and law enforcement, is a profession with inherent risk. In peace, it is a risk of potential conflict. In time of war, the conflict is actual. Combat involves risks different from any profession. At times, sacrifices of companies, squadrons and ships for tactical or strategic advantage are necessary. These are the risks for which compensation is paid. The compensation is paid to the combatant.

E

The risk continues after retired status accures.

The history of military compensation supports the conclusion that retirement-subject-to-recall is a sound national defense policy. Relative peace is what allows the military retired pay to be viewed as a simple annuity by some state domestic relations judges. The retired military has not been put to the ultimate test of a true national emergency in recent years.[2] Were they called back, the absurdity of viewing the retired pay as a vested property right would be apparent. Would remarried former

spouses have a claim on half the service member's active duty pay or would they settle for one-half the former retired pay? At this time in history military compensation is more than ever a part of national defense.

F

At this time in history, military compensation is, more than ever, a part of national defense policy.

The Congress, in providing for military compensation, provides directly for national defense with its decision on expenditures. The military retired pay system required $10 billion dollars in 1979. Military compensation is a significant factor in the success or failure of the all-volunteer armed forces. The ultimate end of the volunteer force may be an open question, but it has an integral function in the defense structure of the United States. Now more than ever, there is a clear federal purpose in all military compensation which should not be frustrated by local action.

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[2]Voluntary return by retired military to active duty in time of war has occured in every conflict since the inception of the system, including the Korean conflict and the Vietnam War. The last mandatory return to active duty was a Presidential Executive Order of September 8, 1939. A current shortage of Army Reserve strength has led to a two year project to organize a mandatory recall of retirees in case of a national requirement. "Test Program Begins for Recall to Active Duty", *Army Echoes,* U.S. Army Finance and Accounting Center, Dept. 90, Indianapolis, Indiana, May/June 1980 at p.1.

II

LOCAL AND STATE PROPERTY LAW FRUSTRATES THE NATIONAL DEFENSE AS IT AFFECTS RETIRED PAY

A

Retiring military personnel must carefully consider which jurisdictions are threats to retired pay.

Local or state action affecting armed forces retirees' pay takes several forms and has distinct consequences which hamper the policy of Congress. Under the current law in states attempting to interpret *Hisquierdo v. Hisquerdo* 439 U.S. 572 (1979), a retiring member of the armed forces must make a decision with respect to the serious differences in property law between states, and the resulting differences in the vulnerability of his or her retirement pay. *Henn v. Henn,* 602 P2d 10, 161 Cal Rptr 502 (1980); *Cose v. Cose.* In the U.S. Supreme Court on Petition for Writ of Certiorari to the Supreme Court of Alaska No. 79-1469. The differences in the law relate to a federal entitlement which should be secure in all states. The differences unfairly hamper a retiree's choice of domicile, but more importantly, diminish the value of retired pay.

A more insidious result occurs where military members, not yet retired, are compelled to enter jurisdictions hostile to their interests. This compulsion is part of military service and discipline, it should not result in damage to the service members' interests. Where a state court awards **future** retired pay, prior to retirement, the extreme is approached. Where a state court

establishes a lump sum value to **future** retirement pay prior to retirement, and awards properly based on that figure, the extreme is reached.[3]

B

"Forum shopping" by spouses, at government expense, is encouraged to maximize their divorce or dissolution rights.

Differing state results in divorce or dissolution actions encourage spouses to seek jurisdictions which will give them the best advantage. Orders overseas afford dependents (spouses) an opportunity to select any jurisdiction and travel there at government expense. The consequences of forum selection can be extremely profitable. It is unfair to subject service members to this "forum shopping" threat and, more importantly here, it is a denigration of the retired pay benefit to the member.

C

The differing state laws produce confusion and undermine the military members' conception of a stable benefit.

The myriad forms of court orders which are directed to armed forces finance centers illustrate the current confusion of state law

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[3]The impact of this extreme situation can be seen in considering, as an example, a military member with 12 years service, joint property (a house) with equity valued at $50,000; who is awarded custody of children, and the house for the benefit of the children not being moved. If the lump sum value of the retired pay is set at $50,000 and awarded to the spouse, there is no longer any incentive to attain retired status, or at best, the accrued value of obtaining that status is reduced by half.

with respect to retired pay. The confusion demonstrated by that report is significant in that the nature of appropriate garnishment of retired pay is unclear to the service member. Many of the armed forces finance centers will comply with state orders which are valid on their face. This practice (which appears appropriate given the lack of definitive direction from the federal courts) places the service member under potential *de facto* jurisdiction of every one of the fifty states in which a spouse might seek such an order.

D

Sovereign states cannot appropriately balance national interests with state interests—nor should they be expected to do so.

It is not our contention that the states have ordered property division in divorce or dissolution actions with an inimical purpose. States which have established community property law are presumed to have done so with a logical basis. Each sovereign state which has ordered payment of retired pay as a division of property without being a community property state is presumed to do so with a logical basis. But as each state weighs its decision the national defense is not a necessary factor. This failure of consideration creates the basis for the preemption doctrine. It is the basis for the *Hisquierdo* ruling and should be the basis for the decision here.

E

The States' intrusions on military benefits violate the compact between the military member and the federal government, and threaten to do so in an *ex post facto* manner.

Another illustration of the inimical effects of state determination of the federal military retired pay policy is the impact of the determination as an infringement of basic contract principle. This impact has two facets. First, and most clearly, the state decisions, assuming *in personam* jurisdiction of both parties to the divorce, are an *ex post facto* alteration of the retired members "contract" with the United States. As a member of the armed forces, a potential combatant anticipates the Congress may alter the retired pay system. He or she enters the service of the United States with the assurance that the United States controls the retired pay entitlement during the entire period of service. The compact does not include the sovereign states during this period. At no time during the career of the military member is any individual sovereign state a party to the decision to continue in the service of the United States, nor should it be. In the case of a service member retiring from an extended absence from a state jurisdiction to find his or her retirement entitlement and obligations altered, all of the considerations which militate against legislative or judicial *ex post facto* decisions are present.

The second facet is related to the first. The states are not a party to the contract. The contract contains bilateral promises. The member is sworn to protect the Constitution of the United States against all enemies, foreign and domestic. The United States grants the service member the benefits of the retired pay

system as a nation[4]. To allow the states to infringe upon the relationship between the armed forces and the United States is a direct violation of the supremacy doctrine.

III

THE *AMICI* ARE NOT OPPOSED TO EQUITABLE ENFORCEMENT OF CHILD SUPPORT, SPOUSAL SUPPORT AND PROPERTY DIVISION BY THE STATES.

The *amici* support the retained power of a state to provide financial support for its citizens. They are in agreement that the power of a state to require support from any of its citizens is a parochial matter subject only to the due process test of a rational basis for any law. Our concern is the application of local concepts of equity in domestic relations law without consideration for, and ultimately at the expense of, our national defense.

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[4]The full consequence and nature of the oath to the Constitution was tested during the American Civil War, and is observable where federal forces act within the states and affect domestic issues.

CONCLUSION

For the foregoing reasons the appeal should be granted and the court below reversed.

Dated December 4, 1980

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed a copy of the Motion for Leave to File an *Amici Curiae* Brief and the accompanying brief to Mr. Walter Winter, Attorney for Appellee and to the attorneys for the appellant.

Executed on December_____, 1980.

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